

1 some sort of meeting, and apparently some preliminary
2 discussions were held concerning developing the set of
3 stipulations pertaining to relative dates and pleadings, and
4 to undertake depositions and admissions. Also some other
5 matters were mentioned.

6 Has anything further developed in this area? Mr.
7 Cole or Ms. Policy?

8 MS. POLIVY: I don't know. I think Mr. Silberman
9 was going to make some inquiries of the Commission.

10 MR. SILBERMAN: I'll let Mr. Block speak to that.

11 JUDGE CHACHKIN: All right. Mr. Block.

12 MR. BLOCK: Thank you, Your Honor.

13 The two issues were -- that were discussed at our
14 initial meeting with counsel that were not resolved and we
15 gave some further thought to it within our own designated
16 trial staff group was whether the Commission would permit
17 discovery outside of the rules, which require that discovery
18 take place under the FOIA. I refer directly to Rule
19 1.311(b)(3), which states that "The Commission's records are
20 not subject to discovery under Section 1.325." The
21 inspection of the Commission records is governed by the
22 Freedom of Information Act, as amended, and refers back to
23 those part of the rules.

24 We have concluded that in light of the specific
25 rule that requires proceeding under FOIA, that that would be

1 the appropriate method of going forward, and that we have
2 not been shown any reason why there ought to be a change in
3 that procedure, subject, of course, to Your Honor's
4 consideration of whatever arguments that Ms. Polivy might
5 have to change that procedure here.

6 So our conclusion is that at this point we are not
7 going to recommend anything other than the compliance with
8 the Commission rules.

9 Similarly, the Commission rules are for
10 depositions of Commission employees, and that is something
11 that we discussed, are governed by Section 1.311(b) (2) of
12 the rules, which requires a special order of the Commission
13 for any designation of oral deposition of Commission
14 employees.

15 We, again, have considered whether there should be
16 a waiver of that requirement of the special order by the
17 Commission, and concluded that they should not be, subject
18 again to whatever conclusions Your Honor might have.

19 We intend to expedite that in order to help to
20 make a complete record and be sure that everyone has an
21 opportunity to have a full ventilation of the issues
22 designated by the Commission. We intend to expedite that
23 request by going to the General Counsel and requesting such
24 a special order be entered.

25 But, once again, we are not inclined to propose

1 anything other than the compliance with the rules as set
2 forth in the Commission Rules of Procedure.

3 JUDGE CHACHKIN: Well, the Rules of Procedure
4 provide for written interrogatories, is that what you're
5 saying?

6 MR. BLOCK: They do. They provide for written
7 interrogatories. The question is whether or not there
8 should be oral testimony, and that's where you must obtain a
9 special order of the Commission. That's what we discussed
10 with the parties, if that is what they would prefer to have,
11 oral depositions. And if that is the course that they wish
12 to pursue, that course would require compliance with Section
13 311(b)(2).

14 JUDGE CHACHKIN: So what is your position? You
15 are only willing at this stage to permit written
16 interrogatories of Commission employees?

17 MR. BLOCK: No. We propose to go to the --

18 JUDGE CHACHKIN: Oh, you are going to go to the
19 Commission and ask for oral depositions.

20 MR. BLOCK: We will expedite that --

21 JUDGE CHACHKIN: All right.

22 MR. BLOCK: -- as much as we can.

23 JUDGE CHACHKIN: All right.

24 MR. BLOCK: With the General Counsel.

25 JUDGE CHACHKIN: And as far as documents, you're

1 saying it should be done under the Freedom of Information
2 Act.

3 MR. BLOCK: That's right.

4 JUDGE CHACHKIN: Any documents requested.

5 MR. BLOCK: That's right. And that's governed --
6 the issue really turns in part on the question of who bears
7 the cost of production. And under FOIA, the requesting
8 party bears that cost, and this is a commercial company.
9 This is a commercial license. There's no reason we see to
10 deviate from the rules as to the party that pays for the
11 inspection and copying of documents.

12 JUDGE CHACHKIN: So do I understand that except
13 for the question of costs, you would permit expedition of
14 the documents? In other words, if Ms. Polivy and the other
15 parties agree to pay the costs, you would make available the
16 documents without the need to file a Freedom of Information
17 request with the Managing Director, is that what you're
18 saying?

19 MR. BLOCK: No, no, that's not what I'm saying,
20 Your Honor. We don't have the documents. The documents are
21 in the files of the Commission. And there is a procedure
22 and a method by which the Mass Media Bureau would go through
23 and obtain documents or for any other division of the
24 Commission. The Inspector General's Office, perhaps the
25 Managing Director's Office. And those matters would be

1 subject to the ordinary course of the Freedom of Information
2 Act. It requires a 10-day response time and with the
3 initial letter and a designation of specific documents to be
4 identified.

5 Until such time as we are shown and good cause is
6 shown to why that rule should not be complied with, we
7 intend to comply with that rule.

8 JUDGE CHACHKIN: Ms. Polivy.

9 MS. POLIVY: Your Honor, I'd like to clarify, if I
10 may, Commission counsel's statement on depositions.

11 I don't quite understand what going to the General
12 Counsel does with respect to a Commission waiver. Are they
13 saying that they will ask the General Counsel to go the
14 Commission directly and ask to permit oral depositions of
15 the Commission staff?

16 MR. BLOCK: Yes.

17 JUDGE CHACHKIN: Mr. Block has indicated in the
18 affirmative.

19 MS. POLIVY: And will the Commission staff support
20 that request?

21 MR. BLOCK: Yes, we will.

22 MS. POLIVY: Then with respect to the depositions,
23 is there any time frame that we can expect some sort of
24 answer?

25 JUDGE CHACHKIN: Mr. Block, when do you intend to

1 do this?

2 MR. BLOCK: We intend to, subject to the outcome
3 of this proceeding today, to file an appropriate request
4 with the General Counsel's Office by the end of the week. I
5 can't predict, of course, what will happen at the Commission
6 level, but we hope -- we will ask for expedition and our
7 intention is to use the General Counsel's Office as an
8 expediting vehicle to get that presented to the
9 Commissioners at the earliest possible time.

10 JUDGE CHACHKIN: Has there been an indication of
11 which persons -- which Commission employees you or Mr. Cole
12 wish to depose?

13 Ms. Polivy?

14 MS. POLIVY: Your Honor, we did discuss a list of
15 people. I don't know if it was yet the totality. But I
16 think the Commission staff is -- those people who were
17 present at the meeting certainly -- and any others that were
18 mentioned, and the IG.

19 JUDGE CHACHKIN: Could you clarify --

20 MS. POLIVY: But I think that the question is to
21 whether or not the Commission will make available -- will
22 permit depositions to be taken of the staff is separate from
23 the question of whether or not an appropriate notice of
24 deposition for a particular person would be filed.

25 JUDGE CHACHKIN: Well, perhaps we --

1 MS. POLIVY: I would imagine that if the
2 Commission says, Yes in this case, we will permit oral
3 depositions," then the question is to whether it is
4 appropriate for any particular person would be governed by
5 the ordinary rules of discovery.

6 JUDGE CHACHKIN: Well, I would --

7 MS. POLIVY: That people would have an opportunity
8 to object.

9 JUDGE CHACHKIN: Well, I would have hope that
10 there could be some stipulation without the need of filing a
11 notice to take depositions.

12 MS. POLIVY: I assumed that they would. The
13 parties, Your Honor, intended to meet again after this pre-
14 hearing conference to see where we were in terms of how we
15 were going to proceed.

16 JUDGE CHACHKIN: Well, I would think that perhaps
17 in any kind of a request to the General Counsel that there
18 would have to be a need to identify the individuals who you
19 wish to depose rather than just a general right to depose
20 Commission staff.

21 I don't know. Mr. Silberman, do you feel --

22 MR. SILBERMAN: Mr. Block.

23 JUDGE CHACHKIN: Mr. Block.

24 MR. BLOCK: We agree with that, Your Honor. That
25 we believe that the request would be as a specific matter,

1 not as a general matter. No doubt that if there was a time
2 when we had a dispute over who should be included in that
3 designation, that Your Honor would be the person to resolve
4 that request. I don't think we've come to that point yet,
5 that we have a dispute. But our request is going to have to
6 be naming individual people, otherwise the Commission can't
7 make a judgment as to the appropriateness of that kind of
8 application on the rules.

9 MS. POLIVY: Your Honor, we can't know at this
10 point exactly -- I mean we know some of them but we can't
11 know all of them until discovery progresses. I mean, for
12 example, we don't know who may be mentioned in some of those
13 things. We don't know who has information that may be
14 relevant.

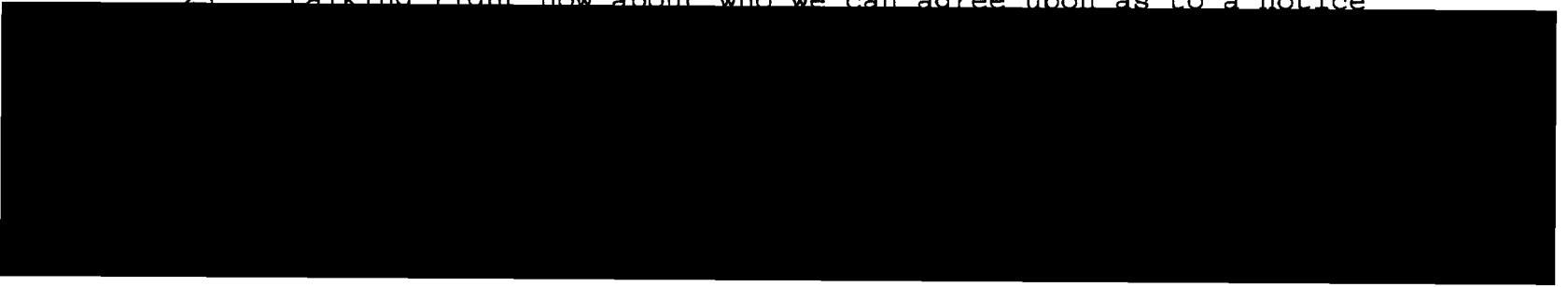
15 You are asking us to give you a list now of what
16 would be discovered. I don't know.

17 JUDGE CHACHKIN: Well, at some point you have to
18 decide who you feel has relevant information that you want
19 to depose.

20 MR. BLOCK: May I respond, Your Honor?

21 JUDGE CHACHKIN: Yes.

22 MR. BLOCK: Nothing prevents us on an appropriate
23 showing to go beyond the initial list either. Discovery
24 always often takes on a second wave, if necessary. We are
25 talking right now about who we can agree upon as to a notice



1 of deposition that we know of.

2 MS. POLIVY: I'm sorry. Go ahead.

3 MR. BLOCK: If we have a dispute down the road as
4 to whether an oral deposition is appropriate for more
5 collateral people, at that point we could decide whether or
6 not that's an appropriate use of the oral deposition
7 facility or whether interrogatories, which are under the
8 rules permitted, ought to be done. But that's really a
9 secondary or tertiary issue.

10 Right now we're talking about the list of people
11 that we have identified, that you have identified. And we
12 are prepared on that list that we've discussed and we can
13 continue to discuss it, to go forward to the Commission and
14 make a request for that. Nothing prevents us six months
15 from now or three months from now from deciding to do that
16 again.

17 JUDGE CHACHKIN: I hope not six months from now.

18 MS. POLIVY: Your Honor, in that case, we would
19 have to go back to the Commission. We have no objection to
20 having each person review as to appropriateness, but to come
21 up with a scheme we're building in, going back to the
22 Commission again, seems to me only to delay matters.

23 If the Commission says, yes, this is a case in
24 which we think oral deposition of the staff would be
25 appropriate, then we don't have to go back should we

1 subsequently have another list of names.

2 JUDGE CHACHKIN: Ms. Polivy, at some point you are
3 going to have to come up with the witnesses you want to
4 depose.

5 MS. POLIVY: Your Honor --

6 JUDGE CHACHKIN: I could set a date to take notice
7 of depositions by -- the parties have to file their notices
8 two weeks from now. You're going to have to come up with a
9 list.

10 Now, if it happens that as a result of depositions
11 or other information that you obtain there's a need -- or
12 you believe there's a need to depose other individuals with
13 the Commission, then you could at that time go to Mr. Block
14 and ask also if you can depose these individuals.

15 But obviously you're not going to get a blanket
16 order that you could depose anybody at the Commission.
17 You're going to have to provide the names of individuals
18 like you would in any other case.

19 Let's assume they're not Commission employees and
20 you wanted to take the notice of deposition. You file a
21 notice of deposition. You still would have to identify who
22 these individuals are.

23 MS. POLIVY: Your Honor, the parties agreed that
24 they would first do the documents so that we could have a
25 reasonable notion of who we want to depose and what we

1 wanted to request. If we are now going to be asked to come
2 up with a list of people for depositions before we even get
3 any documents, it doesn't seem to me a very efficient way.
4 It's building in another step.

5 MR. COLE: Your Honor, may I be heard on this?

6 JUDGE CHACHKIN: Yes, Mr. Cole.

7 MR. COLE: While I concur with Ms. Polivy that it
8 is useful to have as complete a document collection as
9 possible before using depositions, I think this is a rare
10 case where much discovery or matters in the nature of
11 discovery have already occurred over the last several years.
12 So that we have a fairly comprehensive report from the
13 Inspector General listing the people that he interviewed,
14 and there is certainly a reasonable basis for us to begin
15 the process, if that is what it takes, to get a letter to
16 the Commission.

17 Because I think we were all in agreement as to
18 probably a core of five, maybe even 10 witnesses, that we
19 would all like to talk to. That was certainly the sense I
20 got at our meeting the other day, last week.

21 And in light of that, I think it -- what I would
22 propose is that I would concur with Mr. Block that we go
23 forward with a list of people that as of right now, based on
24 the current state of the record of this case, going back
25 over the last three years, that we can all agree on people

1 that we want to talk to, and with the understanding that we
2 will be getting documents and we'll also be conducting
3 depositions after we have a chance to review the documents,
4 and if, based on the review of the documents and the further
5 depositions, we come up with more people, I don't think --
6 my hunch is we will not come up with any new people that
7 everybody doesn't already know about.

8 But if we do, we can then come back and my guess
9 would be it would be an isolated incident and we could
10 probably get a fairly quick action based on whatever action
11 the Commission takes with respect to Mr. Block's initial
12 request.

13 JUDGE CHACHKIN: I think that's a reasonable way
14 to proceed.

15 Ms. Polivy, based on the information we currently
16 have, which Commission employees do you wish to depose? And
17 if it develops that based on documents and other information
18 that there are other individuals you feel you have a right
19 to depose, we'll deal with that.

20 MS. POLIVY: Your Honor, I have no objection to
21 giving a list of the people I have now. It seems to me
22 though that it would be a much more efficient way to proceed
23 if the Commission gave their approval for oral depositions
24 and then depositions proceeded as depositions ordinarily
25 would.

1 If you want to do it some other way, so that we
2 may have to go back to the Commission again, I'm perfectly
3 willing to do that.

4 JUDGE CHACHKIN: All right. That's the way we
5 will proceed. You give a list.

6 Mr. Cole, if you have any names of Commission
7 employees that you feel should be deposed, you also include
8 the list to Mr. Block. And at least we can proceed. We can
9 get that out of the way, get that moving.

10 Now, as far as the Freedom of Information request
11 that you're going to make for documents, I assume, Ms.
12 Polivy, you're going to have to proceed in that fashion,
13 since the rules provide for that.

14 MS. POLIVY: Your Honor, the rules do provide, but
15 the Commission can also waive the rules. The Freedom of
16 Information Act process is quite different from the
17 discovery process. And in this case, what is in issue is
18 not the Commission as a third party but the Commission as a
19 participant.

20 Just as a party would ordinarily be able to
21 discover against another party, to put us in a position of
22 having to go to the Freedom of Information Act, number one,
23 is a non-litigation route with different rules than the
24 discovery rules would ordinarily encompass. And would place
25 on us a cost burden that really I don't think the rules

1 contemplated.

2 This is not simply a case where a third party
3 comes in to the Commission and says, "We want something in
4 your file." This is a case where what happened at the
5 Commission is central to the issue being tried. And in that
6 case, I don't think that it is appropriate to require that
7 we go the Freedom of Information Act route.

8 We have no control over the time. While the rules
9 say you have to have an initial response within 10 days, all
10 that is is you have to -- the Managing Director sends out a
11 letter that says, "We've gotten your request."

12 When we discussed this with Commission counsel, we
13 discussed the difference between a hearing case such as this
14 where what is at issue is what happened at the Commission,
15 as opposed to the ordinary case where as an outsider I would
16 like some information about the Commission.

17 And I think the latter case is an appropriate
18 Freedom of Information Act contemplation, but this kind of
19 case is very different. This is almost the Commission is a
20 party. Not simply from the point of view of looking at
21 things as an outsider.

22 I would ask that --

23 JUDGE CHACHKIN: I have no authority to waive the
24 rules.

25 MS. POLIVY: I understand.

1 JUDGE CHACHKIN: The rules provide if the
2 parties --

3 MS. POLIVY: I understand, Your Honor.

4 JUDGE CHACHKIN: If the parties want to stipulate
5 to some other procedure to expedite the matter, they can.

6 Now, as I understand these documents that we're
7 talking to are already contained in the Inspector General's
8 report or they're referred to.

9 MS. POLIVY: Some of them, Your Honor. There are
10 other documents that we have never seen. And I think that
11 while you cannot waive the rule perhaps, you can ask
12 Commission counsel to ask the Commission in the same request
13 that they're asking the Commission to permit oral
14 depositions, ask the Commission to permit discovery as a
15 normal case.

16 JUDGE CHACHKIN: Mr. Block.

17 MR. BLOCK: I also want to refer to 1.325(b).
18 "Any party seeking the production of Commission records
19 should proceed under Section 0.4640 through 0.4661 of this
20 chapter, which is Freedom of Information."

21 The Commission rules contemplate that the only
22 method by which the Commission employees will be subject to
23 the burden of production of documents in any case will be
24 through the Freedom of Information Act. That we have under
25 the FOIA designated FOIA personnel who are experienced in

1 this matter, in gathering records, in reviewing records, and
2 be able to make production.

3 We are not referring to FOIA as a means of slowing
4 things down. We are referring to FOIA as a means of
5 implementing a procedure which has already been established
6 under the Commission rules.

7 Ms. Polivy is correct that in the ordinary case
8 the Commission's own conduct is not usually at issue, but
9 the rules say, I'll quote again, "Any party seeking
10 production of Commission documents in any case."

11 The Commission is ordinarily a party in most of
12 these cases, and if the Commission wanted to go through the
13 process of requesting subpoenaed documents, it would also be
14 required under the same ordinary course to go through that.

15 The point is is that this is not a matter of
16 slowing things down. I believe that the key critical issue
17 is really the one of cost. And we are not prepared under
18 this current budget -- under the current circumstances to
19 bear the cost of producing documents when there is a
20 procedure under which that cost is to be borne by the
21 requesting party.

22 I don't know how many documents there may be, but
23 there are going to be someone searching through files,
24 looking through documents of the -- for example, the Chief
25 of the Mass Media Bureau, that would require a fair amount

1 of time and effort and copying and that is a cost that we do
2 not propose to bear.

3 JUDGE CHACHKIN: Ms. Polivy, you are going to have
4 to proceed through the Freedom of Information Act if you
5 want documents from the staff.

6 MS. POLIVY: Your Honor, let me ask a question.
7 Is the Commission trial staff going to have
8 available to them Commission documents?

9 JUDGE CHACHKIN: What do you mean by "Commission
10 documents"?

11 MS. POLIVY: Well, is the Commission staff going
12 to be able to go to the Mass Media Bureau and ask for
13 documents.

14 MR. SILBERMAN: May I speak?

15 MS. POLIVY: Or are they going to have to proceed
16 by FOIA requests? Or on the other hand, are we going to
17 have available to us the same documents that they get?

18 It seems to me, first of all, to say that the
19 Commission is, in this case, different situated because it's
20 the action of the Commission staff that is partially at
21 issue, that we should have to pay to discover material that
22 we would ordinarily be able to discover in any case under
23 the ordinary rules, but then to have the Commission staff be
24 able to go and tramp around in the Commission files while we
25 have to ask for FOIA access. It does seem that we're

1 putting parties in different positions. That does raise a
2 basic question of fairness.

3 MR. SILBERMAN: Your Honor, may I speak to this?

4 JUDGE CHACHKIN: Yes, yes, Mr. Silberman.

5 MR. SILBERMAN: We are not going to go to the
6 files because we don't feel as separated trial staff we have
7 a right to go to the Mass Media Bureau or the Inspector
8 General or whatever other office has information and ask
9 that they give us documents that would maybe not be
10 available to you.

11 That we would make a judgment as to what we will
12 have and what we will look at, I think all parties to this
13 proceeding, including the Commission, should have -- and
14 this is why I think the Freedom of Information Act route is
15 a good route. Is that there should be the experienced
16 people at the Commission who do the FOIA work should review
17 the documents pursuant to a Freedom of Information Act
18 request, which I understand Mr. Cole did in the initial
19 stages of this litigation, which was not a hearing case at
20 the time. But he got certain documents through that, and
21 they were made part of the record in the court proceeding.

22 MR. COLE: The tape recordings I received from the
23 Inspector General themselves were not made a part of the
24 record, but I transcribed them. The transcripts of those
25 tapes --

1 MR. SILBERMAN: Right.

2 MR. COLE: -- I received were made a part of the
3 record.

4 MR. SILBERMAN: So I think what we're talking
5 about, Your Honor, are records in the -- possible records --
6 I know there is a file in the Office of Inspector General
7 because they did a report on it.

8 There may be documents in the possession of
9 individuals in the Mass Media Bureau. And those would be
10 subject to discovery under the Freedom of Information Act.

11 But Commission counsel, because of the unusual
12 nature of this case, and because we are separated out from
13 the rest of the Commission, we do not feel that we -- again,
14 for the integrity of the record, should be able to go to the
15 Chief of the Mass Media Bureau and other personnel in the
16 Bureau and say, "Can we see your notes? Can we see your
17 files?" Because I think it would be more appropriate and
18 cleaner, if you will, to go and maintain again the integrity
19 of the process for the Freedom of Information Act request to
20 be filed.

21 Now, my understanding from speaking to someone in
22 the General Counsel Office in general about FOIA, about what
23 happens in these cases about -- I think that one of the
24 objections that counsel for Rainbow has about using this
25 established procedure is the cost involved. And my

1 understanding is that in most cases there is no charge to
2 the initiating party. In many cases that charge is not made
3 for housekeeping reasons, because it may be unduly
4 burdensome for the Commission.

5 I don't know. Mr. Block mentioned about the
6 budget. I don't know what the cost is going to be in this
7 case, but I think one of the ways around that problem is for
8 the initiating party, which would be Rainbow, which has the
9 burden of proceeding in proof under this, and it's the ex
10 parte issue I think that's principally involved here -- if
11 not exclusively -- that she can request a waiver of any fee
12 if she made a good cause showing and we would be prepared to
13 support that. And we would also support in light of the
14 nature of this case an expedited action on this so that the
15 documents were made available.

16 Another point. We would expect that whatever
17 documents were made available pursuant to this procedure to
18 counsel for Rainbow would be made available to counsel for
19 the Commission as a matter of fairness, but, again, there's
20 an established procedure here. The Commission rules
21 contemplate that that's the way to go. And while the
22 Commission may waive that, Your Honor, I don't believe has
23 the authority, with all due respect, to waive it.

24 And I think it's -- and, again, this case arose in
25 large part because of questions, which remain unanswered,

1 about the integrity of the Commission's processes. And I
2 don't think the time has come now, at the initial stage of
3 this proceeding, where we should be toying with that. I
4 think the way we should go is the way the rules contemplate.

5 JUDGE CHACKIN: Ms. Polivy, I see no problem with
6 you going and filing the Freedom of Information request.

7 MS. POLIVY: Your Honor, I would, for the record,
8 like to note that the standard for the availability of
9 documents under FOIA is quite different from the standard
10 for availability of documents under the discovery rules.

11 And to the extent that they limit our ability to
12 acquire documents that we would ordinarily be able to
13 acquire under the discovery rules, we would be prejudiced by
14 that.

15 JUDGE CHACKIN: Well, let's, first of all, try
16 the Freedom of Information Act route and you ask for all the
17 documents you feel are relevant, and let's see what happens
18 before we worry about whether or not you're prejudiced or
19 not.

20 MR. COLE: Your Honor, may I --

21 JUDGE CHACKIN: Yes, Mr. Cole.

22 MR. COLE: -- interject at this point?

23 I have no quarrel with the Freedom of Information
24 Act approach, and that's fine with Press. As to -- and I
25 should also point out that at least it's my understanding of

1 FOIA practice at the Commission or the FOIA requirements of
2 the statute include that in responding to a request, the
3 agency is supposed to provide a comprehensive list of all
4 documents identified in connection with the search, even if
5 they are not produced. Some may be withheld. And the basis
6 for withholding each withheld document will be set forth in
7 what they call a Vaughn Index.

8 So that theoretically at least in response to a
9 reasonably complete FOIA request, we should at least get
10 some idea as to what documents exist. And then we can
11 determine which ones should be produced and which ones
12 shouldn't be produced. And if the Government has withheld
13 some which would normally be discoverable if the Government
14 were a party, then we can come back to you and discuss that
15 and possibly go back to the Commission or the Managing
16 Director.

17 One clarification though as to something Mr.
18 Silberman said. He indicated that he would hope that -- I
19 believe he indicated he hoped that if any documents were
20 provided by the Government in response to a FOIA request to
21 Rainbow, that copies would be made available to Government
22 counsel, and I would request the same. That is -- and that
23 leads me to the broader question is if we pursue FOIA, there
24 is no obligation under FOIA, as I understand it now, to
25 serve anybody else. In other words, FOIA is a purely ex

1 parte request. Joe Average Citizen files a FOIA request
2 with the Managing Director's Office and that's that.

3 JUDGE CHACHKIN: Well, it might be useful to have
4 a joint FOIA request by all the parties. Perhaps Mr.
5 Silberman wants to join in it also.

6 MR. SILBERMAN: We would not object to that, Your
7 Honor. I think that it would be extremely unusual, but I
8 think this is an unusual case. I think because of the
9 nature of the issues which -- and I assume -- and you can
10 clarify this, Ms. Polivy, I assume that the documents that
11 are being requested here are the ones that would be relevant
12 to Issue No. 1, which relates to the ex parte issue.

13 MS. POLIVY: I think certainly for the most part.

14 MR. SILBERMAN: Yes. I think that would be --
15 those would be the documents. And I assume, for example, we
16 would be asking -- or counsel would be asking for any notes,
17 memoranda, or other written documents, letters,
18 correspondence, that were written by persons concerning
19 contacts that were made by parties to this proceeding,
20 namely Rainbow and/or Press, resulting in two meetings which
21 are noted in the record already. That was before the
22 Commission earlier.

23 So I would think that in light of that, there is a
24 finite universe here. I don't think that because of the
25 nature of the people involved -- we know a number of the

1 people by name who might have documents. And they will be
2 contacted by the appropriate FOIA official at the agency,
3 and there will be gatherings of information.

4 And as Mr. Cole pointed out, there will be a list
5 made of documents, so we will know what's in there. And,
6 again, I want to allude to something that Ms. Polivy raised,
7 and I want to make sure I'm understanding it. Because she's
8 indicating that there might be prejudice if something is
9 withheld under this procedure because of the nature of the
10 two procedures.

11 It seems to me, for example, in depositions of the
12 persons who are involved in these meetings that we will be
13 able to ask them at their depositions if they have any notes
14 or memoranda or documents and we will be able -- if they
15 weren't initially produced, we could ask for them to be
16 produced later on. In other words, there are safety valves
17 here. There are ways of protecting the interests of the
18 parties in getting documents, again, using this established
19 procedure.

20 JUDGE CHACKIN: So, Mr. Silberman, you wouldn't
21 object to being a party to this FOIA request?

22 MR. SILBERMAN: Mr. Block will --

23 JUDGE CHACKIN: Mr. Block.

24 MR. BLOCK: Yes. Your Honor, with all respect to
25 Mr. Silberman, I would like to reserve on that -- reflect on

1 that. There is no reason why this Court, or Your Honor,
2 cannot order exchange of documents by virtue of the fact
3 that we're all here. I don't think we have to be a formal
4 party to it. I don't know what the implications are in
5 terms of cost sharing, for example.

6 (Laughter)

7 MR. BLOCK: Which is an issue.

8 MR. COLE: At this time, I would be available for
9 a joint filing, Your Honor.

10 MS. POLIVY: You see what's really driving this
11 whole thing, whether or not it's going to cost the
12 Commission money.

13 MR. BLOCK: I do want to make it clear that in the
14 normal course, so we can put a ribbon around this one, in
15 the normal course, in a normal course if we made a request
16 for documents, for example, to Ms. Polivy and her client,
17 they would get together. She would represent the client's
18 interest. She would meet with the client. Look for the
19 documents, and give them to us.

20 Mr. Silberman has emphasized the fact that that
21 procedure doesn't work because we are, in fact, separate
22 from the Bureau and separate from the Commission in that
23 sense. We can't represent them in the way we otherwise
24 would in that kind of production. So we really do have to
25 rely on a formal process. I agree with that. Whether we